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No. 606

# In the Supreme Court of the United States

OCTOBER TERM, 1946

UNITED STATES OF AMERICA, PETITIONER

*v.*

SAMUEL BAYER, ELIAS BAYER AND WALTER V. RADOVICH

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit reversing the convictions of respondents for conspiracy to defraud the United States.

### OPINION BELOW

The opinion of the circuit court of appeals (R. 1467–1476) has not yet been reported.

### JURISDICTION

The judgment of the circuit court of appeals was entered August 14, 1946 (R. 1476). On September 13, by order of the Chief Justice, the Government's time to file a petition for a writ of

certiorari was extended to October 12, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether a voluntary confession by an officer of the Army held in military custody was rendered inadmissible under the rule of *McNabb* v. *United States*, 318 U. S. 332, where such officer, though duly served with a copy of the charges against him in the course of the investigation prescribed by the 70th Article of War, was not served, within eight days after his arrest, with the charges that were referred for trial after that period; and if so, whether a second confession, voluntarily made when the accused was free from restraint, was rendered inadmissible through the circumstance that the accused, at his own request, reread his earlier confession at the time he made his second statement.

2. Whether a claim of double jeopardy may properly be based on a conviction by court-martial which was disapproved because of failure of the tribunal to afford accused an opportunity to present evidence in support of his plea to the jurisdiction; and if so, whether a trial by court-martial for conduct unbecoming an officer and a gentleman and for conduct to the prejudice of good order and military discipline and of a

nature tending to bring discredit upon the military service, by accepting money for arranging the transfers of certain enlisted men to prevent their going overseas, bars a trial in a federal district court for conspiracy to defraud the United States of its right to the honest performance of the officer's duty.

3. Whether the district court committed an abuse of discretion in refusing to reopen the case, four hours after the jury had retired, to allow the defense to introduce additional evidence.

4. Whether the court below correctly held that the trial judge's concededly proper statement of the law in his instructions concerning the defense of extortion constituted reversible error because the statement was too cryptic.

## STATUTES INVOLVED

Section 37 of the Criminal Code, 18 U. S. C. 88, provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

Article of War 70, 10 U. S. C. 1542, provides in part:

No charge will be referred to a general court martial for trial until after a thorough and impartial investigation thereof shall have been made. This investigation will include inquiries as to the truth of the matter set forth in said charges, form of charges, and what disposition of the case should be made in the interest of justice and discipline. At such investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after such investigation, they shall be accompanied by a statement of the testimony taken on both sides.

Before directing the trial of any charge by general court martial the appointing authority will refer it to his staff judge advocate for consideration and advice.

When any person subject to military law is placed in arrest or confinement, immediate steps will be taken to try the person accused or to dismiss the charge and release him. Any officer who is responsible for unnecessary delay in investigating or carrying the case to a final conclusion shall be punished as a court martial may direct. When a person is held for trial by general court martial the commanding officer will, within eight days after the accused is arrested or confined, if practicable,

forward the charges to the officer exercising general court-martial jurisdiction and furnish the accused a copy of such charges. If the same be not practicable, he will report to superior authority the reasons for delay. The trial judge advocate will cause to be served upon the accused a copy of the charges upon which trial is to be had; and a failure so to serve such charges will be ground for a continuance unless the trial be had on the charges furnished the accused as hereinbefore provided. In time of peace no person shall, against his objection, be brought to trial before a general court martial within a period of five days subsequent to the service of charges upon him.

## STATEMENT

Respondents were convicted in the United States District Court for the Southern District of New York on a one count indictment charging conspiracy to defraud the United States of its right to the faithful and disinterested services and judgment of officers of the United States Army (R. 8–11, 1176). The indictment specified that it was part of the conspiracy that respondent Samuel Bayer, father of Martin Bayer and uncle of Melvin Usdan, both of them soldiers in the United States Army, and respondent Elias Bayer, uncle of the two boys, would give respondent Radovich, an officer of the United States Army, $7,000 in order to induce Radovich to transfer the boys to various units for

the purpose of keeping them from being sent out of the United States for duty overseas. Samuel Bayer was sentenced to imprisonment for two years and to pay a fine of $10,000; Elias Bayer to imprisonment for eighteen months and to pay a fine of $5,000; and Radovich to imprisonment for a year and a day (R. 1211–1212). On appeal, the judgments of conviction were reversed (R. 1476).

**The evidence for the Government**

A short time before December 15, 1942, Samuel Bayer learned that boys enlisting in the Army before December 15 would be allowed to select the branch of service in which they wished to serve (R. 184, 276–277). Martin Bayer, Samuel's son, and Melvin Usdan, his nephew, both enlisted in the Air Corps and were assigned as clerks to base headquarters at Mitchel Field, Long Island (Gov. Ex. 27, R. 907, 1312; Gov. Ex. 11, R. 496, 1233). In the period following this assignment, Elias Bayer met and introduced to Samuel various officers attached to the First Fighter Command at Mitchel Field (R. 133, 187, 363, 395; Ex. 8, R. 491, 1225). Samuel and Elias Bayer entertained these officers extensively (R. 149, 395; Gov. Ex. 11, R. 496, 1241–1242; Gov. Ex. 19, R. 505, 1274; Gov. Ex. 20, R. 505, 1285–1287), and Samuel Bayer, through his company, the Plymouth Thread Company, paid for uniforms made for the officers by a firm owned by Samuel's brothers-in-

law (R. 134–135, 152, 166–167, 186–188, 201, 366–367; Gov. Ex. 13, R. 498, 1246).[1]

In April 1943, members of the Women's Army Corps began to replace male clerical personnel at Mitchel Field with the result that male personnel were pooled for transfer to other fields (R. 369, 397). One Colonel Jacobson requested the transfer of Martin and Melvin from base headquarters to the First Fighter Command (R. 397–398). Samuel Bayer told another officer that he understood that the effect of this transfer was to assure the assignment of the boys to Mitchel Field for approximately one year (R. 278). A few days after the transfers were effected, Samuel Bayer tendered a dinner to Colonel Jacobson at the Waldorf-Astoria Hotel and presented him with four new automobile tires (R. 370–372).

The April transfer placed Melvin and Marvin under the command of Radovich (R. 835). In July 1943, there were rumors current at Mitchel Field that the Bayers were making gifts to officers of the First Fighter Command (R. 207–208, 280–281). Radovich informed Samuel Bayer that the boys would have to be transferred (R. 924; Gov. Ex. 25, R. 661, 1309). At Samuel's request to

[1] In the summer of 1944, at Samuel Bayer's request, the books of the uniform company were altered to indicate that payment had been made by the officers themselves rather than the Plymouth Thread Company (R. 190–195). Prior to this, both of the Bayers, when interviewed by an Army investigating officer, had denied paying for the uniforms and had denied making payments to Radovich (R. 507–513).

have the boys kept at Mitchel Field, Radovich approved a transfer of the boys from his own unit to the medical corps at the field (R. 115–118; Gov. Ex. 25, R. 661, 1309–1310). While this transfer was pending, Samuel and Elias went to Mitchel Field and asked Colonel Vidal to facilitate the transfer (R. 137–139). After the transfer was effected, Samuel paid Radovich approximately $2,000 (Gov. Ex. 25, R. 661, 1310).

A short time later, the boys were transferred to an airborne engineer unit scheduled for duty overseas (R. 140). Samuel and Elias requested Colonel Vidal to prevent the transfer, but were informed that nothing could be done (R. 140–141). Samuel also communicated with various Army officers whom he had previously met and attempted to induce them to arrange to have the boys transferred out of the engineering unit, but these officers declined to intercede (R. 160, 176–177, 374). Samuel told one officer he would do anything in his power to keep his boys from going overseas (R. 176).

In the meantime, Radovich had left Mitchel Field and joined the First Air Commando Group (R. 253). This organization was given highest priority on personnel, and its officers' requests for transfer of personnel were regularly and quickly honored (R. 231–232, 254). In August and September 1943, Radovich, on three occasions, discussed with Captain Pepper, a personnel offi-

cer at Mitchel Field, the possibility of arranging a transfer of Marvin and Melvin out of the airborne engineers to the Air Transport Command, a unit set up for service in the continental United States (R. 208–211). Pepper told Radovich that the boys could be transferred only at the request of an organization having a higher priority than the airborne engineers (R. 209). Radovich suggested to Pepper that it might be possible to have the boys transferred to the First Air Commando Group and subsequently have them dropped as surplus and transferred to the Air Transport Command (R. 211). Pepper agreed that in this way a transfer might be arranged (R. 211). Radovich told Pepper that if he could effect such a transfer, it would be "worth his while," and he would see that it would be worth Pepper's while (R. 211–212).

In September 1943, Samuel Bayer asked an Army officer whether he thought there would be any trouble if his boys were transferred out of the alerted unit. When the officer said that he thought the consequences would be serious, Bayer cried and said that he wanted his son out of the unit. (R. 283–284.)

On November 22, 1943, at the request of Radovich, a special order was issued from Headquarters Army Air Forces in Washington directing the transfer of Melvin and Marvin to the First Air Commando Group at Goldsboro, North

Carolina, and ordering them to report not later than November 25 (Gov. Ex. 3, R. 119–120; R. 256). On November 24, Radovich called a clerk in the office of the Army Air Forces in Washington and requested that the boys be transferred from the Air Commando Group to the Air Transport Command (R. 256–257). This request was honored by a letter dated November 25, 1943, from Headquarters Army Air Forces in Washington (R. 123). The transfer was effected on November 29, 1943 (Gov. Ex. 4, R. 121–122). Shortly thereafter, Elias Bayer and an unidentified man met Radovich outside the railroad station at Goldsboro and gave him an envelope containing $5,000 (Gov. Ex. 15, R. 500, 1254–1256; Gov. Ex. 20, R. 505, 1279, 1281; Gov. Ex. 25, R. 661, 1311). Thereafter Radovich sent Captain Pepper a bank draft in the sum of $500 (R. 212; Gov. Ex. 25, R. 661, 1311).

**The Bayers' defense**

The Bayers sought to defend themselves against the charge of conspiracy on the ground that the payment of money to Radovich was not made pursuant to agreement but was extorted by Radovich. In statements given to the United States Attorney before trial, which were introduced in evidence by the Government, the Bayers said that after Radovich had transferred the boys to the medical unit in August 1943 he asked for money (Gov. Ex. 8, R. 491, 1226–1228; Gov. Ex. 13, R. 498,

1249–1250; Gov. Ex. 20, R. 505, 1277, 1278), and that after the boys had been transferred to the Air Commando Group, Radovich came to New York and told Samuel Bayer that he would take the boys overseas to Burma unless he received $5,000 (R. 1229–1231, 1279). In their defense, the Bayers called as a witness Samuel Bayer's secretary, Ann Solomon (R. 915). She testified that on the same morning that Martin Bayer telephoned his father that he was being transferred to Goldsboro, North Carolina (R. 929–930), a date fixed by Melvin Usdan as November 24, 1943 (R. 862), Radovich called from Washington and asked Samuel Bayer to meet him for lunch that day; that at lunch Radovich in her presence said that he was taking the boys with him to Burma unless Bayer paid him $5,000 (R. 928–929). A clerk in the office of the Army Air Forces Headquarters in Washington, D. C., had previously testified for the Government that on November 24, Radovich called her from Goldsboro, North Carolina, and asked her to transfer Marvin and Melvin to the Air Transport Command (R. 256–257), and it had also been shown that the request was acknowledged by a letter dated November 25, 1943 (R. 123).

In discussing the Bayers' defense of extortion, the United States Attorney pointed out to the jury that Samuel Bayer had approached other officers seeking to have his son transferred out of

the airborne engineers (R. 1069) and further argued that the Bayers' denials that they made any gifts to Radovich when they were first questioned by military authorities was inconsistent with their defense that they were the victims of extortion (R. 1070). Then, after noting that the luncheon meeting to which Miss Solomon testified must have occurred on November 24th, the United States Attorney stated (R. 1072):

> So, on the very day, November 24th, that Radovich, according to Bayer, is making the first threats here in New York to take these boys unless he got $5,000, Radovich, according to Miss Goertz, is actually in Goldsboro, North Carolina, and is calling Miss Goertz from Goldsboro to Washington and asking her to issue the orders transferring the boys as surplus out of the Air Commando unit and into the Air Transport Command. Her testimony is clear, it is exact, and it is uncontradicted. She fixed November 24th definitely as the date that Radovich called her from Goldsboro and asked her to issue the orders transferring the boys out of the Air Commando group to the Air Transport Command.
>
> Now we see clearly here from the undisputed evidence that this alleged extortioner is in fact bringing about the transfers of the boys out of the Transport Command [*sic*] on the very day that, according to Sam Bayer, he, Radovich, is threaten-

> ing to take the boys on a dangerous mission that he arranged—he, Radovich, arranged—through Miss Goertz for the transfer of these boys out of the Air Commando unit the day before the boys even arrived at Goldsboro. Because Melvin Usdan's testimony is that they did not get to Goldsboro until the 25th. So that by the time they arrived there Radovich, in carrying out the conspiracy, with the aid of the lady in Washington, had already arranged to get them out of the Commando.

The next day, before the judge charged the jury, counsel for the Bayers stated that they had been surprised by the Government's questioning of the meeting on November 24 and that a check of the records had shown a collect call from Washington to the Bayers on that date (R. 1116–1117). The court stated that, if counsel so desired, he would tell the jury that the records showed such a collect call, and counsel requested the court to tell the jury that the statement was being made at their request (R. 1125–1126). At the suggestion of counsel for Radovich, the court also stated that he would tell the jury that the records did not show who made the call (R. 1127). The judge made such a statement to the jury at the opening of his charge (R. 1129).

After the jury had been out about four hours (R. 1154) they asked for a rereading of the judge's charge on conspiracy and of the United States Attorney's summation (R. 1155). The

judge declined to read the summation of one counsel without reading the summations of all (R. 1155). Some of the jurors stated that they were particularly interested in the United States Attorney's summary of the telephone messages and meetings from November 22 to November 25, 1943 (R. 1163, 1166–1167). Thereafter, counsel for the Bayers asked leave to put in evidence records he had obtained from the telephone company showing a collect call from Arlington, Va., by one "Ravish" on November 24, 1943 (R. 1170–1171, 1472). The United States Attorney objected, pointing out that even if Radovich had made such a telephone call from Washington, that fact would not tend to disprove that the request to transfer the boys to the Air Transport Command had been given on the same day as the alleged threat to take the boys to Burma, and would not detract from the fact that a letter ordering the transfer had been sent from Washington on the very next day, November 25 (R. 1172).[2] The judge declined to reopen the case at that point (R. 1173). On appeal, a majority of the circuit court of appeals held that, in view of the jury's question, this action by the trial judge was an abuse of discretion which constituted reversible error (R. 1470–1471).

[2] Miss Solomon had testified that Radovich was in New York and had again asked for money on the day following the luncheon meeting, i. e., on November 25 (R. 930).

In instructing the jury with respect to the Bayers' defense of extortion, the trial judge charged as follows (R. 1157–1158):

> Counsel for the defendants Bayer claims that payments of money by defendant Samuel Bayer to defendant Radovich were made as the result of express or implied threats by defendant Radovich to improperly and unfairly include privates Martin Bayer and Melvin Usdan in the Air Commando Group organized for [an] immediate dangerous overseas mission, which would be a violation of his duty as an officer.
>
> The Government contends that such payments of money were made voluntarily by mutual agreement in the course of the conspiracy charged.
>
> If you believe from the evidence beyond a reasonable doubt that at any time during the period alleged these three defendants mutually agreed to defraud the United States as alleged in the indictment, and did some act in pursuance of such agreement, they would be guilty irrespective of whether the actual payment of money were made voluntarily or involuntarily. However, as to the payments of money, if you believe that they were coerced by the defendant Radovich, that is, that they would not have been made at all in whole or in part except for Radovich's threats, then such payments would not be the result of agreement nor any evidence of a crime. And if you so believe, and also are not

satisfied beyond a reasonable doubt by other evidence in the case that the conspiracy existed as charged in the indictment, you should find all the defendants not guilty, as Radovich is not here charged with extortion.

However, in your consideration of this phase of the case, I charge you that the matter of whether or not the payments were made at the suggestion of Samuel Bayer or upon the demand of Radovich, or whether the payments were made cheerfully or grudgingly, or whether or not they were greater than Samuel Bayer expected, are immaterial if you are satisfied beyond a reasonable doubt that the payments were made by and in the course of the agreement of the defendants.

The opinion of the circuit court of appeals indicates that a majority of the court thought this charge too cryptic, although it does not appear from the opinion whether reversal of the judgments would have been predicated on such ground alone (R. 1471).

**Radovich's confession.**

In the course of the trial, the Government offered in evidence a statement by Radovich given to an agent of the F. B. I. on March 15 and 17, 1945, in which Radovich admitted accepting $7,000 from the Bayers for arranging the transfers of Marvin and Melvin (R. 531–533; Gov. Ex. 25, R. 661, 1306–1312). When counsel for Radovich ob-

jected to the admission of this statement, a hearing was had outside the presence of the jury on the question of its admissibility (R. 533–536). The facts adduced at that hearing are as follows:

On August 9, 1944, Radovich was placed under arrest at Mitchel Field pending a trial by general court martial for violation of the 95th and 96th Articles of War (R. 591). He was confined to a separate room in the psychopathic ward of the hospital at the field (R. 561–563). On August 10, 1944, charges were preferred against him (R. 584–585), and on August 25 the report of the investigation of those charges was sent to headquarters (R. 606). In the meantime, on August 21, 1944, Radovich had submitted his resignation for the good of the service, stating therein that he had been informed that charges were pending against him for violation of the 95th and 96th Articles of War (R. 596–597).[3]

[3] The resignation was forwarded to headquarters, Army Air Forces, with a favorable recommendation on January 27, 1945. The indorsement forwarding the application stated that the reason for delay was that, at the request of the United States Attorney, all action in the case had been suspended pending completion of an investigation of the civilians involved. (R. 596–598.) The resignation was "not favorably considered" by the War Department in March 1945 (R. 598–601), i. e., it was rejected. The charges were referred for trial by court-martial in May, 1945, and Radovich was formally served with the charges on which he was to be tried on May 29, 1945 (R. 586–587). The reason given for the delay in the trial by court-martial was the request of the United States Attorney that no action be taken pending completion of the investigation of the civilians involved (R. 606–607).

For the first eight or ten days of his confinement in the psychopathic ward, Radovich was not allowed out of the room and was deprived of all articles which might be used to inflict injury (R. 561, 566). Thereafter, he was taken for a walk each day (R. 573). In the course of his daily exercise, Radovich mentioned to the guard who accompanied him that he would like to consult with Warrant Officer Bradspies, his counsel. The guard transmitted this request to his superior officer, and Bradspies was directed to interview Radovich. (R. 576, 578–579.) Some time thereafter (see R. 579), on September 5 or 6, 1944, a colonel introduced two F. B. I. agents to Radovich, told him that the agents wanted to talk to him about the case, and that it was up to Radovich whether he wanted to say anything to the agents (R. 541–542). During the interview with the F. B. I. agents, Radovich made or received some telephone calls, and the name of Bradspies was mentioned (R. 543, 549). Also, during the course of that interview, an officer delivered to Radovich an order instructing him not to wear his decorations, but Radovich refused to remove them (R. 553, 577–578). Radovich signed a written statement at that time (R. 538).

On September 16, 1944, Radovich was released from the hospital and subjected to administrative restriction allowing him the freedom of the base except for the officers' club, base operations, flying field and flying lines (R. 593–595). On January

2, 1945, the restrictions imposed on September 16 were removed, except as to the officers' club, and Radovich was required merely to secure permission from the base commander prior to any departure from the limits of the base (R. 595).

Between September 16, 1944, and March 15, 1945, Radovich had a number of conversations with F. B. I. agents, sometimes on his own initiative and sometimes by appointment (R. 537–538). In the course of these interviews, he recounted some facts not covered in the statement given to the F. B. I. in September 1944, and the F. B. I. arranged a meeting with Radovich to incorporate the entire story into one statement (R. 536–539). At the request of Radovich, the agent produced the original statement given in September 1944, and Radovich read over that statement before making his second statement in March (R. 539, 540, 551). Only the March statement was offered in evidence.

The trial judge ruled that the statement of September 5, 1944, was voluntary, that Radovich's confinement at that time was not illegal, and that, in any event, any infirmity in the September statement did not apply to the March statement (R. 657–658). He accordingly admitted the March statement, but only as against Radovich (R. 660). On appeal, the circuit court of appeals held that this was error; it said that since Radovich had not been served with copies of charges within eight days after his arrest, as

required by Article of War 70, his custody was analogous to that of a person held on a criminal charge without preliminary arraignment, and, hence, that any confession obtained during such period was inadmissible under the rule enunciated by this Court in *McNabb* v. *United States*, 318 U. S. 332; and that since the first confession was used at the time the second was given, the irregularity of the custody tainted the second as well as the first.

**Radovich's plea of double jeopardy**

On June 29, 1945, Radovich was convicted by court martial on charges of violating Articles of War 95 and 96 (10 U. S. C. 1567, 1568), Appendix, *infra*, p. 38, i. e., of conduct unbecoming an officer and gentleman, and of conduct to the prejudice of good order and military discipline and of a nature to bring discredit upon the military service. As to each offense, the specification alleged that in August 1943 Radovich received from Samuel Bayer $2,000 to effect the transfer of Marvin Bayer and Melvin Usdan from the First Fighter Command to the medical detail at Mitchel Field, and that on or about December 1, 1943, he accepted and received from Elias Bayer $5,000 for effecting the transfer of the boys from an organization alerted for duty overseas to the Air Transport Command. (R. 14–17).[4]

[4] The conviction of an officer for the same acts under both Article of War 95 and Article of War 96 was held proper in *McRae* v. *Henkes*, 273 Fed. 108 (C. C. A. 8), certiorari denied, 258 U. S. 624.

The indictment in the instant case was returned on July 12, 1945 (R. 3). On September 26, 1945, Radovich filed a plea in bar alleging that his conviction by court-martial precluded his trial under the present indictment (R. 4, 13–14). The Government demurred to the plea (R. 20–21).

On the argument of a motion for a continuance before argument on the plea, counsel for Radovich stated that he thought the court-martial conviction had been disapproved (R. 27), but that he had not been officially so informed (R. 30). The United States Attorney stated that he had seen the decision of the Board of Review disapproving the conviction (R. 41). In ruling on the plea and the demurrer thereto, however, the court accepted the allegation in the plea that Radovich had been convicted by court-martial (R. 55). The judge sustained the government's demurrer on the ground that the offense charged in the indictment was not the same as the charges on which Radovich had been tried by court-martial (R. 83–85).

On appeal, the circuit court of appeals ruled that the plea of double jeopardy should have been sustained if Radovich's conviction by court-martial was final. However, inasmuch as the record left the status of the military judgment in doubt, and a new trial was being ordered for other reasons, the circuit court of appeals left open the question of double jeopardy for determination on the new trial.

We have been informed by the Office of the Judge Advocate General that on August 17, 1945, the Board of Review disapproved the conviction of Radovich on the ground that the court-martial had erred in failing to give him an opportunity to offer evidence in support of his plea to the jurisdiction in which he alleged that his real accuser was the person who convened the court-martial. See Article of War 8, 10 U. S. C. 1479. The Judge Advocate General concurred in that holding, and an order disapproving the conviction was promulgated by the War Department on July 26, 1946 (General Court-Martial Order No. 240). No rehearing by court-martial under Article of War 50½ (10 U. S. C. 1522) was ordered.

SPECIFICATION OF ERRORS TO BE URGED

The circuit court of appeals erred:

1. In reversing the judgments of conviction.

2. In holding that the confession made by Radovich in March 1945 was inadmissible in evidence.

3. In holding that a confession, made by Radovich in September 1944, while he was in military custody, after investigation of charges against him but before the charges were referred to a court-martial for trial, was illegally obtained.

4. In holding that the confession made by Radovich in March 1945, when he was free of restraint, was inadmissible because at the time

he made that statement he reread his earlier confession at his own request.

5. In holding that Radovich's conviction by court-martial on charges of conduct unbecoming an officer and of conduct to the prejudice of good order and military discipline and of a nature to bring discredit upon the military service would sustain a plea of double jeopardy to an indictment charging conspiracy to defraud the United States.

6. In holding that the district judge abused his discretion in refusing to reopen the case after the jury had retired in order to permit the Bayers to introduce evidence.

7. In holding that the charge to the jury explaining the law relative to the Bayers' defense of extortion was too cryptic.

## REASONS FOR GRANTING THE WRIT

1. In holding Radovich's March 1945 confession inadmissible in evidence, the court below has decided questions of importance in both military and civil law in a manner inconsistent with decisions of this Court and contrary to the interests of justice.

(a) The decision of the court below, construing the provision of Article of War 70 for forwarding and serving of charges within eight days after arrest, if practicable, as analogous to the requirement for prompt arraignment of persons charged with crime, is predicated upon a

complete misconception of military procedure. Article of War 70, so far as pertinent, provides:

> No charge will be referred to a general court martial for trial until after a thorough and impartial investigation thereof shall have been made. This investigation will include inquiries as to the truth of the matter set forth in said charges, form of charges, and what disposition of the case should be made in the interest of justice and discipline. At such investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after such investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides.
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> When any person subject to military law is placed in arrest or confinement, immediate steps will be taken to try the person accused or to dismiss the charge and release him. Any officer who is responsible for unnecessary delay in investigating or carrying the case to a final conclusion shall be punished as a court martial may direct. When a person is held for trial by general court martial the commanding officer will, within eight days after the accused is ar-

rested or confined, if practicable, forward the charges to the officer exercising general court-martial jurisdiction and furnish the accused a copy of such charges. If the same be not practicable, he will report to superior authority the reasons for delay. The trial judge advocate will cause to be served upon the accused a copy of the charges upon which trial is to be had, and a failure so to serve such charges will be ground for a continuance unless the trial be had on the charges furnished the accused as hereinbefore provided. In time of peace no person shall, against his objection, be brought to trial before a general court martial within a period of five days subsequent to the service of charges upon him.

Implementing this article, the Manual for Courts-Martial (1928, corrected to 1943) specifically provides (par. 35*a*, p. 24):

> At the outset of the investigation the accused will be informed of the following: The offenses charged against him; the **names of the accuser and of the witnesses,** as far as then known to the investigating officer; the fact that the charges are about to be investigated; his right to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf, either in defense or mitigation; his right to have the investigating officer examine available witnesses requested by him; and his right to make or

submit a statement in any form subject to the risk of having such statement used against him.

Thus, at the outset a person subject to military law who is charged with crime is informed of the nature of the complaint against him. We are informed that it is customary to do so by showing him the written charges. See TM 27–255, *Military Justice Procedure* (1945), p. 38. Thereafter an investigation is had which, Article 70 directs should be completed within eight days if practicable. After the investigation is completed the charges and a summary of the evidence with respect thereto are forwarded to the officer exercising appropriate court-martial jurisdiction, who decides whether a trial should be had. If a trial is ordered, the accused is then served with a copy of the charges actually referred for trial.

The only step in the entire process which is in any way similar to arraignment is the procedure for investigation of charges before they are forwarded to the officer exercising court-martial jurisdiction. Arraignment before a committing magistrate in criminal cases is designed to require the Government to show probable cause for holding the accused and it enables the accused to learn the charges against him (see *McNabb* v. *United States*, 318 U. S. 332, 343–344). These functions are served by the investigatory procedure prescribed by Article of War 70 and by par. 35 of the Manual.

Thus, before the results of the investigation are forwarded to the officer exercising general court-martial jurisdiction, the accused has already been informed of the charges against him and has already had an opportunity to learn the nature of the Government's evidence and offer evidence on his own behalf. The provision for completion of the investigation and forwarding of charges within eight days, if practicable, is designed primarily to insure prompt dispositon of the charges. In no way is it analogous to arraignment.

There is no showing in this case that the investigatory procedure prescribed by Article of War 70 and the Manual for Courts-Martial was not followed. While the record shows that the charges were forwarded on August 24, 1944, after completion of the investigation, 15 days after Radovich's arrest, it is silent as to when the investigation was commenced, at which time, in accordance with the procedure prescribed by the Manual, the accused is normally shown (i. e., served with) the charges. It must be presumed that the investigating officer acted in compliance with his plainly prescribed official duty. See *Stearns Co.* v. *United States*, 291 U. S. 54, 63; *United States* v. *Chemical Foundation*, 272 U. S. 1, 14–15; *Town of Weyauwega* v. *Ayling*, 99 U. S. 112, 119. Moreover, the matter does not rest merely in presumption, since Radovich's resignation, dated August 21, 1944, shows

that he knew the nature of the charges against him which were then under investigation (see Statement, *supra*, p. 17).

The basic assumption of the decision below, that Radovich was not served with the charges under investigation within eight days after his arrest, is thus not supported by the record. The court failed to realize that Article of War 70 provides for service of charges on two different occasions, once when the charges are being investigated and again when they have actually been referred for trial. The evidence in this case that Radovich was served with charges on May 29, 1945, relates to the service of the charges which had been referred for trial, and not to service of charges during the course of the investigation preliminary to trial.

Under these circumstances, we submit that the situation of Radovich on September 5, 1944, when he made his first statement to the F. B. I., is not analogous to that of a person held without arraignment, but is similar to that of a defendant who has been properly arraigned and held for the district court. And in such a situation, an accused soldier is not, like a civilian charged with a noncapital offense, entitled to bail; he remains in custody. Nothing in the *McNabb* decision requires the exclusion of a voluntary confession made by a person so held. Certainly the mere fact that Radovich made his confession while he was in custody did not render it inadmissible. *United States* v. *Mitchell*, 322 U. S. 65.

There can be no doubt that the September 5 confession was, as the District Court found, a voluntary one. Radovich had previously consulted with counsel, and he may have talked with counsel while the agents were interviewing him (see Statement, *supra*, p. 18). He was so far from being intimidated, that he refused to obey an order directing him to remove his military decorations. Under such circumstances, we submit that the court below was in error in holding that the September 5 confession would have been inadmissible under the *McNabb* rule if it had been offered in evidence.

(b) However, even if for some reason not now apparent the September confession should be considered inadmissible, we submit that the court below went far beyond any decision of this Court in holding that such inadmissibility tainted the second confession made six months later when Radovich was free of all substantial restraint. During that six month period Radovich had full opportunity to consult such counsel as he chose. Had he desired to limit or repudiate his earlier confession in any respect, he had ample opportunity to do so. Instead, he freely and voluntarily reaffirmed and amplified his earlier statement. To hold a confession thus freely given unavailable as evidence merely because, at his own request, Radovich reread his previous statement, seems to us a disservice to the cause of criminal justice.

When the court below applied to the second confession the rule of *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, that the fruits of evidence improperly obtained are themselves inadmissible, it failed to give due consideration to the essential difference between a second confession and the fruits of an illegal search; it failed to take into account the fact that a second confession may well involve an exercise of the free will of the person confessing. In the *Silverthorne* case, the defendants never consented either to the original search or to the subsequent use of the evidence obtained from that search. Certainly in that case if, after the first illegal search, the defendants had voluntarily delivered to the Government the evidence illegally seized, such evidence would not have been inadmissible merely because the government agents happened to have knowledge of the existence of the records as a result of their illegal search. Here Radovich, when admittedly free of coercion, voluntarily reaffirmed his previous statement, thus voluntarily giving the Government the information previously obtained. It is therefore immaterial whether he did or did not reread his previous statement. The significant fact is that at a time when he was free to repudiate or reaffirm his earlier statement, he himself, in the exercise of his free will, voluntarily confessed his guilt. The second confession was not evidence obtained as the result of the first and independently of any intervening action by

Radovich; his voluntary decision to reaffirm his previous statement, which he himself asked to see, was the operational fact which brought the second confession into existence.

This Court, in *Lyons* v. *Oklahoma*, 322 U. S. 596, made it clear that the mental freedom of an accused at the time a second confession is given is the significant factor to be considered in determining the admissibility of the later statement. In failing to give due weight to the factor of free will involved in the making of the second confession, the court below disregarded the basic foundation of that decision.

The logical effect of the decision below would be that whenever a confession has been obtained under circumstances which would render it inadmissible under the *McNabb* rule, no future confession, however freely given, could be admitted into evidence. The decision below does not purport to go that far, but its reasoning, consistently followed, would require such a result. Any person who has once made a confession must be aware of that fact, and his later statement will almost always to some extent be influenced by what he has previously said. The circumstance that an accused rereads his earlier statement instead of relying on his memory does not seem to us a sound basis for distinguishing between the admissibility and inadmissibility of the later confession. The true test is whether the second confession is a voluntary one made under circum-

stances free of coercive influence. Since the decision below thus tends to cast doubt on the admissibility of a second confession following an inadmissible confession, it is directly contrary to the ruling of this Court in *Lyons* v. *Oklahoma, supra*, and it raises a problem of importance in the administration of the criminal law.

2. The decision below on Radovich's plea of double jeopardy seems to us so contrary to principles enunciated by this Court that we would urge this aspect of the case as a basis for certiorari were it not for the fact that, in our opinion, under the decision below and the actual facts as we have ascertained them, the defense would not be available to Radovich on a new trial. As we set forth in the Statement, *supra*, p. 22, Radovich's court-martial conviction was disapproved on the ground that the court-martial erred in failing to give him an opportunity to offer evidence in support of his plea to its jurisdiction. No rehearing was ordered. At military law, a direction for rehearing must be made at the same time as the action disapproving the sentence; it cannot be made later. Manual for Courts-Martial, par. 89; 2 Bull. JAG 97, sec. 408 (5); TM 27-255, *Military Justice Procedure* (1945) p. 128; see Dig. Op. JAG (1912-1940), sec. 396 (3). In view of the direction of Article of War 40 (10 U. S. C. 1511) that no proceeding in which an accused is found guilty by court-martial shall be held to be a trial constituting

jeopardy until the reviewing authority has taken final action, and in view of the circumstance that the disapproval of the conviction was based on reasons not going to the merits, we think that the trial by court-martial cannot now support a plea of double jeopardy. See *Sanford* v. *Robbins*, 115 F. 2d 435, 438–439 (C. C. A. 5), certiorari denied, 312 U. S. 697, and cases there cited. The opinion of the court below recognizes that if the record had shown that the conviction by court-martial had been disapproved, the plea of double jeopardy would not have been available. Since the facts as to the disapproval are matters of official record, we submit that, on review of the other aspects of this case, this Court may properly consider the actual situation, and if it finds the trial otherwise free from error, may reinstate the judgment as to Radovich.

On the other hand, if the disapproval of the court-martial conviction does not render the question of double jeopardy moot, then review of this issue is warranted. This Court, in its recent decision in *Pinkerton* v. *United States*, No. 719, Oct. T. 1945, decided June 10, 1946, reaffirmed its earlier rulings to the effect that, in deciding questions of double jeopardy, it is the elements of the offenses charged, and not the evidence offered in support thereof, which are determinative. And in *Glasser* v. *United States*, 315 U. S. 60, 66–67, this Court made it clear that a charge of conspiracy to deprive the United States of its

governmental functions by accepting payments to influence official action is a different offense from conspiracy to take or give a bribe. These decisions were disregarded by the court below when it ruled that a trial for conduct unbecoming an officer and a gentleman and for conduct to the prejudice of good order and military discipline and of a nature to bring discredit upon the service by accepting a bribe was a trial for the same offense as conspiracy to defraud the United States.

3. In reversing the judgment as to the Bayers because of the failure of the trial judge to reopen the case for the admission of evidence after the jury had retired (see Statement *supra*, pp. 13–14), the court below reversed as to Radovich as well because the charge was conspiracy (R. 1473). Hence, a review of Radovich's conviction necessarily raises the question of the validity of the reversal on such ground as to all three respondents.

Independently of this consideration, we submit that the decision below constitutes such an unwarranted substitution of the judgment of the circuit court of appeals for the discretion of the trial judge as to require review by this Court. The circuit court of appeals, we submit, misconstrued the purport of the United States Attorney's argument and the significance of the excluded evidence in relation thereto. The gist of the argument was that the defense of extortion was

untenable for the reason that, at the very time when, according to the defense, Radovich was making threats to send Marvin and Melvin overseas unless he received $5,000, he had already arranged for the transfer of the boys to a command scheduled for duty in the United States. Whether Radovich did or did not call Samuel Bayer from Washington, whether he did or did not see him in New York, the Government was still in a position to argue that Radovich could not have made the alleged threats because he had already put it beyond his power to carry the threats into effect. The United States Attorney did not directly question the alleged meeting in New York; he did strongly question the claim that threats had been made in order to extort money.

The evidence that the transfer had been arranged on November 24, 1943, and officially made on November 25 had been introduced as part of the Government's case long before Miss Solomon testified to threats by Radovich on November 24 and 25. The fact that the defense failed to appreciate that the Government's evidence tended to undermine their claim of extortion certainly does not constitute such surprise as would necessitate the reopening of the trial. And since, as we have shown, the evidence offered by the Bayers in no way detracted from the substance of the Government's argument, we submit that the trial judge committed no abuse of discretion in re-

fusing to reopen the case four hours after the jury had retired. The matter was one for the discretion of the trial judge (*Crumpton* v. *United States,* 138 U. S. 361, 364; *Safford* v. *United States,* 252 Fed. 471, 474 (C. C. A. 2); *Hart* v. *United States,* 84 Fed. 799, 804 (C. C. A. 3)), and the circuit court of appeals exceeded its appellate function in finding an abuse of discretion on these facts. Cf. *United States* v. *Johnson,* 327 U. S. 106.

4. The court below admitted that the charge to the jury explaining the Bayers' defense of extortion, see *supra,* pp. 14–16, was an accurate statement of the law, but a majority thought that it was too cryptic. There is no showing that the jury failed to understand it. To us it seems to have stated in clear terms that, if the jury found that the payments by the Bayers were made as a result of threats by Radovich, the payments could not be the result of a criminal agreement, and hence would not establish conspiracy. Insofar, therefore, as the reversal of the convictions of the Bayers was predicated on this portion of the judge's charge, we submit that the ruling of the court below was erroneous, and contrary to the decisions of this Court.

The history of the harmless error statute set forth by this Court in *Kotteakos* v. *United States,* Nos. 457, 458, Oct. T. 1945, decided June 10, 1946, makes it clear that prejudice is not to be presumed from the mere finding of error, and

that any alleged error must be judged in the light of the whole case. Here there is not even a finding of error, and there is no showing of prejudice. The evidence in the case is strong and convincing. The mere circumstance that a majority of the court below might have worded the charge in somewhat more elaborate phraseology does not seem to us a proper ground for the reversal of a well merited conviction. The decisions of this Court in *Bollenbach* v. *United States*, 326 U. S. 607, and *Bihn* v. *United States*, No. 675, Oct. T. 1945, decided June 10, 1946, require that a charge be accurate, not that it be verbose.

## CONCLUSION

For the foregoing reasons we respectfully submit that this petition for a writ of certiorari should be granted.

J. HOWARD MCGRATH,
*Solicitor General.*

OCTOBER 1946.

# APPENDIX

Article of War 95, 10 U. S. C. 1567, provides:

> Any officer or cadet who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service.

Article of War 96, 10 U. S. C. 1568, provides:

> Though not mentioned in these articles, all disorders and neglects to the prejudice of good order and military discipline, all conduct of a nature to bring *discredit upon the* military service, and all crimes or offenses not capital, of which persons subject to military law may be guilty, shall be taken cognizance of by a general or special or summary court-martial, according to the nature and degree of the offense, and punished at the discretion of such court.

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